

No. 12673

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United States  
Court of Appeals  
for the Ninth Circuit.

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COLES TRADING COMPANY, a Corporation,  
Appellant,

vs.

SPIEGEL, INC., a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
District of Arizona.

FILED

NOV - 3 1950

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Phoenix, Arizona,  
Attorneys for Appellant.

JENNINGS, STROUSS, SALMON AND TRASK,  
Title and Trust Building,  
Phoenix, Arizona,  
Attorneys for Appellee.

In the District Court of the United States  
for the District of Arizona

No. Civil 1306 - Phoenix

COLES TRADING COMPANY, a Corporation,  
Plaintiff,

vs.

SPIEGEL, INC., a Corporation,  
Defendant.

### COMPLAINT

For its claim against defendant, plaintiff alleges:

#### I.

That plaintiff is a corporation, organized and existing under the laws of the State of Arizona, having its principal office and place of business at Phoenix, Maricopa County, Arizona; defendant is a corporation, organized and existing under the laws of the State of Delaware, but having an office and place of business at Phoenix, Maricopa County, Arizona; the matter in controversy herein exceeds in value the sum of \$3,000.00, exclusive of interest and costs.

#### II.

Plaintiff is Lessee of certain land and premises located at the Southeast corner of East Adams Street and North First Street, Phoenix, Maricopa County, Arizona, under and by virtue of a lease in writing, executed and delivered on April 30, 1938, by and between J. W. Dorris and Sallie G. Dorris,

his wife, the then owners of the land and premises therein described, as Lessors, and Dorris-Heyman Furniture Company, an Arizona corporation, as Lessee; a full, true and correct copy of which said lease is hereto annexed, marked "Exhibit A," and made a part hereof; the option therein contained to extend the term of said lease has heretofore been exercised, and said lease now subsists in full force and effect; said lease is hereinafter referred to as "the Lease." Thereafter, said Dorris-Heyman Furniture Company, a corporation, by amendment of its Articles of Incorporation, changed its corporate name to "Coles Trading Company."

### III.

On July 17, 1945, plaintiff subleased the land and premises described in the Lease to defendant, by an instrument in writing, a full, true and correct copy of which is hereto annexed, marked "Exhibit B," and made a part hereof; said sublease has not been terminated, but subsists in full force and effect, and will be hereinafter referred to as "the Sublease." To the Sublease, executed and delivered as aforesaid, was attached a copy of the Lease.

### IV.

The Lease contains the following provision:

"The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of

either of them in any year in excess of the sum of Fifteen Thousand (\$15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand (\$15,000.00) Dollars, will pay in addition to the regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand (\$15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company Lease.”

#### V.

For the calendar year 1948, property taxes, as regularly levied and assessed by the State of Arizona and its political subdivisions upon and against the leased and subleased premises, exceeded the sum of \$15,000.00; and on November 13, 1948, The Valley National Bank of Phoenix, as Trustee Under the Wills of J. W. Dorris and Sallie G. Dorris, both deceased, successor in interest to said Lessors, made written demand on plaintiff for payment to it of the sum of \$4,517.51, representing that proportion of such excess of taxes payable by Lessee under and by virtue of the provision hereinabove set forth of the Lease.

## VI.

Under and by virtue of the provisions of the Sublease, defendant subleased from plaintiff the land and premises described in the Lease and the Sublease, subject to all of the terms of the Lease, including the specific provision hereinabove set forth; it having been, at all times, the intention of plaintiff and defendant, in the execution and delivery of the Sublease, that defendant assume and perform all terms and conditions of the Lease by Lessee to be performed, excepting only those five covenants or conditions designated "(a), (b), (c), (d)" and "(e)," as expressly set forth and contained in the Sublease.

## VII.

On or about November 23, 1948, plaintiff made demand upon defendant for the payment by it to said The Valley National Bank, as Trustee, of said sum of \$4,517.51, payable pursuant to the terms and conditions of the Lease and the Sublease; that defendant failed and refused, and still fails and refuses, to pay said amount or any part thereof.

## VIII.

Plaintiff has heretofore paid to The Valley National Bank, Trustee as aforesaid, the sum of \$4,517.18, representing the excess of taxes due and payable by Lessee pursuant to the terms of the Lease and the Sublease.

Wherefore, plaintiff prays judgment against defendant for the sum of \$4,517.18, together with in-

terest thereon at the rate of 6% per annum from February 23, 1949, until paid, and its costs herein.

SHIMMEL, HILL & HILL,

By /s/ BLAINE B. SHIMMEL,  
Attorneys for Plaintiff.

Exhibit A

Lease

This Indenture, made this 30th day of April, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, of Phoenix, Arizona, hereinafter called Lessors, and Dorris-Heyman Furniture Company, a corporation, organized and existing under the laws of Arizona, and having its office and principal place of business at the City of Phoenix, Arizona, and hereinafter called the Lessee, Witnesseth:

The Lessors do by these presents, and in consideration of the payments of rent, promises, covenants and agreements of the Lessee hereinafter contained, lease, demise and let unto the said Lessee, the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

The North Half (N $\frac{1}{2}$ ), and the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N $\frac{1}{2}$ ) the North Half (N $\frac{1}{2}$ ) of the first and second floors; of that certain building at the southeast corner of First and Adams Streets, located on lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being



understood that the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwater Mercantile Company, lessee of the balance of said building.

For the term commencing May 1st, 1938, and ending September 30th, 1949, at and for the monthly rental of Eighteen Hundred Fifty (\$1850.00) Dollars per month, payable on the fifth day of each and every month during the term beginning on the fifth day of May, 1938. All payments shall be made to the credit of the Lessors at The Valley National Bank, in Phoenix, or in such bank or trust company in said City of Phoenix, as the Lessors may in writing, addressed and delivered to the Lessee, hereinafter designate.

The Lessee hereby leases the said premises for the term above mentioned at and for the rental above specified, and hereby agrees and binds itself to pay said rental in manner aforesaid, promptly, without demand made therefor, and to do and perform all of its promises, covenants and agreements herein contained.

The Lessee hereby accepts the leased premises and the air cooling system, the heating system therein, all machinery, the elevators, boilers, sidewalks, roof, window glass, plate glass and toilets, as being in satisfactory, tenantable condition, and hereby agrees to keep the same in repair and good, tenantable condition, making such replacements as may be necessary during the term of this lease.

The Lessee agrees upon the end of the term, or other termination of the lease, to surrender the premises to the Lessors in as good condition as the same now are, reasonable wear and tear excepted.

Notwithstanding the provisions herein contained, repairs or replacements made necessary by fire or the elements, such as may be provided for by the eight point insurance policy in common use, are not required to be made by the Lessee. The Lessee agrees to reimburse Lessor for the excess of premium on eight point policy over premium on fire policy.

To assure the availability of funds to make repairs or replacements caused by boiler explosion, Lessee agrees to carry boiler explosion insurance.

The Lessee will at all times during the term of this lease, keep the leased premises free and clear of all rubbish and waste material of a combustible nature, except in the shipping, packing and repair and shop rooms and on the fourth floor.

The Lessee may make any changes in the leased premises that are not detrimental to the building, provided that notice of intention to make such changes and of the nature thereof shall be given the Lessors or their agent not less than ten (10) days before the making thereof.

The Lessee shall have the right, at any time during the continuance of this lease, to remove any and all fixtures placed by it upon said premises, insofar as the same can be done without damage to the premises, provided all sums due for rent have been paid.



The Lessee will at all times during its occupancy of said premises hereunder save and keep harmless the Lessors from liability, loss, cost, damage or expense by reason of any accidents happening to any employee, customer or other person or persons invited or allowed by it to use the said leased premises, or to be in or about the same and to that end to carry a policy or policies of insurance indemnifying the Lessors either separately or jointly with the Lessee against such loss, cost, damage or expense, in a responsible liability company or companies, to an amount not less than Ten Thousand (\$10,000.00) Dollars.

The Lessee hereby covenants and agrees not to let or underlet the whole or any part of said premises, or to permit any other person to occupy the same, and not to assign, voluntarily or involuntarily, or mortgage, pledge or otherwise transfer this lease or any interest therein without the written consent of the Lessors first had and obtained, and any such written consent given by the Lessors shall not waive consent in writing to any succeeding assignment, mortgage, pledge, transfer or sublease and upon such sale, transfer or attempted sale or transfer of this lease, or of the leasehold premises, except as above provided, whether voluntary or involuntary, or the subletting of the whole or any part of said premises without the written consent of the Lessor first had and obtained, or upon the failure of the Lessee to pay any installment of rent at the time the same becomes due, as hereinbefore provided,

or upon the violation of the Lessee of any of the terms, covenants, and conditions of this lease, or should the Lessee make an assignment for the benefit of creditors, commit an act of bankruptcy, be sold out or attached by Sheriff's sale, or other compulsory procedure, process or order of the court, or become a party to any court procedure contemplating a reorganization, then and in any such case, the whole rent for any unexpired portion of the term of this lease, or any continuation thereof, shall at the option of the Lessors at once become due and payable as if by the terms of this lease it were made payable in advance, and shall be paid out of the proceeds of such assignment, sale or procedure, or at the option of the Lessors, they may declare this lease void and at an end for and on account thereof, or for or on account of any violation of the terms and conditions thereof by the Lessee, and this lease shall thereupon be immediately terminated and cancelled and possession of the premises surrendered to the lessors or their grantee. Nevertheless, the Lessors will not refuse to grant permission in writing to the Lessee to sublet all or portions of said premises during the term of this lease to such person or persons as may be deemed by the Lessors to be satisfactory as tenants of the said premises, upon request being made to them by the said Lessee for the privilege of so subletting the same.

This lease shall not be terminated if the leased premises are injured or damaged by fire, the elements, or any other cause to such extent as to be untenable or unfit for occupancy, but if said premises are so damaged by fire or the elements as to be

untenantable or unfit for occupancy, no rent shall be payable during the period that said premises are so untenable, or unfit for occupancy, and the Lessors shall rebuild or restore said premises with all convenient speed, and when said premises are so rebuilt or restored, payment of the rent shall be resumed; provided, that if said premises are wholly destroyed, or so greatly damaged that they cannot be rebuilt or restored to a condition fit for occupancy within a period of six (6) months, this lease shall terminate and both parties shall be released from future obligations thereof; provided, further, that Lessee shall have the right to require the leased premises to be rebuilt if at the time such damage or destruction occurs or within thirty (30) days thereafter the Lessee shall remain obligated to pay rent (after allowance of six months to rebuild) for not less than three and one-half years.

The Lessors shall at all reasonable times have the right to enter upon the leased premises and every part thereof for the purpose of inspecting the same.

It is understood that the remainder of the premises covered in part by this lease are covered by a lease to Goldwater Mercantile Company, a corporation; that the heating system for the leased premises is and will be jointly operated, repaired and maintained by the two tenants and that there are certain other respects in which said two tenants of the lessors have cooperated and will hereafter cooperate for their mutual benefit. The Lessors hereby agree that said tenants may enter into such

arrangements between themselves as may be mutually satisfactory to them which arrangements may include the use at times or permanently of certain facilities and portions of the premises jointly, and the Lessors hereby agree that they will cooperate in carrying out said mutual arrangements between said tenants, but any such arrangements shall not jeopardize the right of the Lessors to the full amount of rental herein agreed to be paid nor the right to require full performance of the Lessee of its covenants to repair and make necessary replacements on the leased premises. Unless otherwise agreed upon between said tenants, repairs and replacements on the premises not directly related to the building shall be made by the Lessee herein, for the North Half (N $\frac{1}{2}$ ) of said Lots Four (4), Five (5) and Six (6), in said Block Twenty (20). The repairs and replacements on the roof and the third and fourth floors shall be made wholly by the Lessee in this lease.

The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of either of them in any year in excess of the sum of Fifteen Thousand (\$15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand (\$15,000.00) Dollars, will pay, in addition to the

regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand (\$15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company lease.

It is a part of the consideration for this lease that the lease between the parties hereto of the premises covered hereby, dated the 4th day of October, 1928, and all agreements and understandings, written or verbal, pertaining to the leased premises, shall be and hereby are terminated as of April 30th, 1938, and from and after said date this lease shall be the only agreement between the Lessors and the Lessee pertaining to the leased premises hereinbefore described, it being understood and agreed that the extension of the term, the option for an additional period hereinafter granted and the reduction in rent, are the consideration for releasing the Lessors from duties and obligations heretofore imposed upon them by existing leases and agreements.

In consideration of the execution of this lease, the Lessors hereby grant to the lessee the right, privilege and option to extend the term of this lease for the period of ten (10) years from and after September 30, 1949, at a rental of Twenty-one Hundred and Fifty (\$2150.00) Dollars per month. Said option may be exercised only by the Lessee giving written notice to the Lessors before September 30th, 1948.



All of the covenants, provisions and agreements of this lease shall remain in full force and effect and shall be carried over into and during the extension period in all respects as in this lease provided, the only change being the increase in monthly rental.

All of the terms and conditions hereof shall be binding upon the heirs, successors and assigns of the parties hereto.

In Witness Whereof, the Lessors have hereunto set their hands and the Lessee has caused these presents to be executed in its corporate name and by its officers thereunto duly authorized, and its corporate seal to be hereunto affixed the day and year first above written.

J. W. DORRIS,  
SALLIE G. DORRIS,  
Lessors.

[Corporate Seal]

DORRIS-HEYMAN FURNI-  
TURE COMPANY,  
By F. E. COLES,  
President, Lessee.

Attest:

J. H. COLES,  
Secretary.

State of Arizona,  
County of Maricopa—ss.

The foregoing instrument was acknowledged before me, Harold L. Divelbess, a Notary Public in and for the State and County aforesaid, on this 3rd

day of May, 1938, by J. W. Dorris and Sallie G. Dorris, his wife.

[Seal]                      HAROLD L. DIVELBESS,  
  Notary Public.

My Commission expires December 28, 1940.  
State of Arizona,  
County of Maricopa—ss.

The foregoing instrument was acknowledged before me, Harold L. Divelbess, a Notary Public in and for the State and County aforesaid, on this 3rd day of May, 1938, by F. E. Coles, as President and J. H. Coles, as Secretary of Dorris-Heyman Furniture Company.

[Seal]                      HAROLD L. DIVELBESS.

My Commission expires December 28, 1940.

Exhibit B  
(The Sublease)

This Indenture, made this 17th day of July, 1945, by and between the Dorris-Heyman Furniture Co., a corporation, organized and existing under the laws of Arizona, and having its office and principal place of business in the City of Phoenix, Arizona, hereinafter called Lessor, and Spiegel, Inc., a corporation, organized and existing under the laws of Delaware, and having its principal place of business in the City of Chicago, Illinois, hereinafter called the Lessee:

## Witnesseth:

The Lessors do by these presents, and in consideration of the payments of rent, promises, covenants and agreements of the Lessee hereinafter contained, sub-lease, demise and sub-let unto the said Lessee, the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

The North Half (N $\frac{1}{2}$ ), and the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N $\frac{1}{2}$ ); the North Half (N $\frac{1}{2}$ ) of the first and second floors; and all of the third and fourth floors; of that certain building at the southeast corner of First and Adams Street, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwater Mercantile Company, lessee of the balance of said building.

commonly known as the southeast corner of East Adams and First Street, Phoenix, Arizona, on which is located, and from which is operated the business of the Dorris-Heyman Furniture Co., for the term commencing August 1, 1945, and ending September 30, 1959, at and for a monthly rental for said demised premises, payable on the first day of each month in advance for the first fifty (50) months, commencing August 1, 1945, and ending September 1, 1949, the sum of Three Thousand Eight Hundred and Fifty Dollars (\$3,850.00), and



for the next fifty-five (55) months, commencing October 1, 1949, and ending April 30, 1954, the sum of Four Thousand One Hundred and Fifty Dollars (\$4,150.00), and for the remaining sixty-five (65) months, commencing May 1, 1954, and ending September 1, 1959, the sum of Three Thousand and Fifty Dollars (\$3,050.00), subject to the terms of, and with all the rights, privileges and benefits granted the Dorris-Heyman Furniture Co. under, a certain lease dated April 30, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, as Lessors, and Dorris-Heyman Furniture Co., an Arizona corporation, as Lessee, demising the above-described premises (hereinafter sometimes referred to as "over-lease"), a photostatic copy of which over-lease is attached hereto and made a part hereof.

It is expressly understood and agreed, however, that anything in said over-lease to the contrary notwithstanding:

(a) Lessor shall be responsible for any structural repairs and for any extraordinary repairs not due to the negligence of the Lessee or its agents which it may be necessary to make on the building located on said demised premises and Lessee shall be obligated, except as to such structural or extraordinary repairs, to maintain said building in good condition and repair, ordinary wear and tear and fire and other casualties excepted.

(b) Lessee shall not be in default on rent until fifteen (15) days after notice, during which time Lessee shall fail to cure the default, or on matters

other than rent, until thirty (30) days after notice, during which time Lessee fails to cure default.

(c) In the event of fire, rent shall abate in proportion to the amount of the demised premises no longer usable for business purposes and it shall be the duty of the Lessor to restore the demised premises promptly, and upon failure of Lessor to restore the demised premises promptly, and upon failure of Lessor to so restore the demised premises, Lessee shall have the right at its election to cancel the lease or to restore the demised premises and to deduct the cost of restoration from rental due or to become due hereunder.

(d) In the event Lessor shall owe Lessee any sum or sums of money from time to time pursuant to the terms, promises, covenants, considerations and guarantees of this lease or of that certain purchase agreement dated July 17, 1945, between the Dorris-Heyman Furniture Co. as Seller and Spiegel, Inc., as Purchaser, Lessee shall notify Lessor, and Lessor agrees to forthwith pay such sum or sums of money. In the event that Lessor shall fail from time to time to pay said amount or amounts within twenty (20) days after receiving such notice, then Lessee shall be permitted to withhold rental due or which shall become due hereunder.

(e) In the event that less than Twenty-Five Per Cent (25%) of the demised premises is taken by eminent domain, rental shall abate proportionately. If Twenty-Five Per Cent (25%) or more of the premises are taken by eminent domain, Lessee shall have the option to cancel the lease or to continue as

Lessee at a rental abated proportionate to the percentage of the premises taken by eminent domain. All the damage awards resulting from the taking of the demised premises by eminent domain shall belong to the Lessor, except that the Lessee shall be entitled to that portion of the award made for loss of business or for the restoration of the demised premises or fixtures insofar as Lessee shall, and insofar as it shall be Lessee's duty or right to restore the premises or fixtures.

It is further expressly understood and agreed that Lessor will use its best efforts to obtain the consent of J. W. Dorris and Sallie G. Dorris, or their successors, assigns, administrators, executors, or trustees of their estates, if any, as Lessors, under said over-lease, to the sub-letting or assigning by the Lessee hereunder to any subsidiary, affiliate or successor or to any other individual, partnership, or corporation which is financially responsible, on the condition that Lessee shall not thereby be relieved of any liability, and in the event such consent is obtained, then, and in that event, Lessor shall grant to Lessee the right to sub-let or assign the demised premises to any subsidiary, affiliate or successor or to any other individual, partnership, or corporation which is financially responsible.

It is further expressly understood and agreed that Lessor will use its best efforts to obtain the consent of J. W. Dorris, and Sallie G. Dorris, or their successors, assigns, administrators, executors, or trustees of their estates, if any, as Lessor under said over-lease to allow Lessee to enter into such

lease agreements for leased departments as it shall see fit, and in the event such consent is obtained, then, and in that event, Lessor shall grant to Lessee the right to enter into such agreements for leased departments as Lessee shall see fit.

Lessor agrees to deliver to the Lessee on or before July 31, 1945, an exercised option to renew said over-lease and it is expressly understood and agreed that Lessee may deliver said exercised option to the Lessor under said over-lease.

Notices required to be sent under this sub-lease shall be sent to the Lessee at 1061 West 35th Street, Chicago 9, Illinois, attention: Mr. Walter A. Gatzert, Secretary, and to the Lessor addressed as follows: Mr. F. E. Coles, 90 North Country Club Drive, Phoenix, Arizona, or to any other addresses that either party may in writing designate.

In Witness Whereof, the Lessor has caused these presents to be executed in its corporate name and by its duly authorized officers, and its corporate seal to be hereto affixed, and the Lessee has caused these presents to be executed in its corporate name and by its duly authorized officers, and its corporate seal to be hereunto affixed, the day and year first above written.

DORRIS-HEYMAN FURNI-  
TURE CO.,  
F. E. COLES,  
President.

[Corporate Seal]

Attest:

J. J. COLLINS,  
Secretary.

SPIEGEL, INC.,  
M. J. SPIEGEL, JR.,  
President.

[Corporate Seal]

Attest:

WALTER A. GATZERT,  
Secretary.

State of Arizona,  
County of Maricopa—ss.

The foregoing instrument was acknowledged before me Blaine B. Shimmel, a Notary Public in and for the State and County aforesaid, on this 23rd day of July, 1945, by F. E. Coles as President and J. J. Collins as Secretary of Dorris-Heyman Furniture Co.

[Notarial Seal]

BLAINE B. SHIMMEL,  
Notary Public.

My Commission expires May 31, 1947.

State of Illinois,  
County of Cook—ss.

The foregoing instrument was acknowledged before me, F. E. Anderson, a Notary Public in and for the State and County aforesaid on this 17th day of July, 1945, by Modie J. Spiegel, Jr., as President and Walter A. Gatzert as Secretary of Spiegel, Inc.

[Notarial Seal]

F. E. ANDERSON,  
Notary Public.

My Commission expires 10/14/45.

[Endorsed]: Filed April 18, 1949.

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant, Spiegel, Inc., a corporation, by Jennings, Strouss, Salmon & Trask, as attorneys, and for its answer to the complaint of the plaintiff filed herein, admits, denies and alleges:

#### First Defense

For its first defense, said defendant avers that the complaint of the plaintiff fails to state a claim upon which relief can be granted.

#### Second Defense

##### I.

Answering Paragraphs I, II, III and IV of plaintiff's complaint this defendant admits the allegations therein contained.

##### II.

Answering Paragraph V of plaintiff's complaint this defendant is without knowledge or information sufficient to form a belief as to the truth thereof.



## III.

Answering Paragraph VI of plaintiff's complaint this defendant alleges that the provisions of the lease and sublease referred to in said paragraph are specifically set out in Exhibits "A" and "B" attached to plaintiff's complaint; that said provisions are plain and unambiguous and set forth correctly the terms of said instruments and the rights and obligations of plaintiff and defendant thereto. Further answering said paragraph this defendant denies, each and every, all and singular, the allegations therein not expressly admitted herein.

## IV.

Answering Paragraph VII of plaintiff's complaint this defendant admits that plaintiff made demand upon defendant as referred to in said paragraph and that this defendant has failed and refused and still fails and refuses to pay the amount of said demand or any part thereof, but the defendant denies that the sum referred to in said paragraph is payable pursuant to the terms and conditions of the sublease between this plaintiff and this defendant, and further denies that this defendant has any duty or obligation to pay the sum referred to in said paragraph.

## V.

Answering Paragraph VIII of plaintiff's complaint this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

Wherefore, having fully answered, said defend-

ant prays that the plaintiff take nothing by its complaint and that this defendant have its costs and disbursements herein expended.

JENNINGS, STROUSS,  
SALMON & TRASK,

By /s/ O. M. TRASK,  
Attorneys for the Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 9, 1949.

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In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF MONDAY  
SEPTEMBER 26, 1949

Plaintiff's Motion to Set comes on regularly for hearing this day. Rouland W. Hill, Esq., is present for the plaintiff. Ozell Trask, Esq., is present for the defendant.

It Is Ordered that this case be and it is set for trial January 5, 1950, at 10:00 o'clock a.m.



In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF MONDAY  
OCTOBER 24, 1949

The Defendant's Motion for Judgment on Pleadings comes on regularly this day. Rouland W. Hill, Esquire, appears for the plaintiff. Ozell Trask, Esquire, appears for the defendant.

Said Defendant's Motion for Judgment on Pleadings is now argued by respective counsel, submitted and taken under advisement.

It Is Ordered that the defendant be and it is allowed five days to file reply memorandum.

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In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF THURSDAY  
DECEMBER 22, 1949

It Is Ordered that the Defendant's Motion for Judgment on the Pleadings be and it is denied.

In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF THURSDAY  
JANUARY 5, 1949

This case comes on regularly for trial this day. Blaine B. Shimmel, Esq., and Rouland W. Hill, Esquire, appear for the plaintiff. Ozell Trask, Esquire, is present for the defendant. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

Plaintiff's Case

Frank E. Coles is now sworn and examined on behalf of the plaintiff.

The following plaintiff's exhibits are now admitted in evidence:

1. Tax statements
2. Statement
3. Cancelled checks.
4. Letter

Whereupon, the plaintiff rests.

Defendant's Case

William H. Klein is now sworn and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

- A. Letter
- B. Letter
- C. Minutes of meeting
- D. Photostat copy of option
- E. Photostat copy of agreement
- F. Copy of letter

On motion of counsel for defendant, It Is Ordered that the defendant be allowed to substitute photostat copies in lieu of defendant's original exhibits A and B, which is now done.

And the defendant rests.

Both sides rest.

Counsel for plaintiff waives opening brief. It Is Ordered that the defendant be allowed 30 days to file answering brief and plaintiff 20 days to reply, subject to oral argument thereafter.

In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF MONDAY  
MARCH 13, 1950

On motion of Rouland W. Hill, Esquire, counsel  
for the defendant,

It Is Ordered that this case be and it is set for  
oral argument Monday, March 20, 1950, at 10:00  
o'clock a.m.

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In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF MONDAY  
MARCH 20, 1950

This being the time heretofore fixed for oral argu-  
ment herein, Blaine Shimmel, Esquire, appears as  
counsel for the plaintiff and Ozell, Trask, Esquire,  
is present as counsel for the defendant.

The case is now argued by respective counsel, and  
It Is Ordered that the record show that this case  
is now submitted and taken under advisement.

In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF WEDNESDAY  
MAY 24, 1950

This cause having been submitted and taken under  
advisement,

It Is Ordered that the defendant have judgment  
herein.

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In the District Court of the United States  
for the District of Arizona

No. 1306—Phoenix

COLES TRADING CORPORATION, a Corpora-  
tion,

Plaintiff,

vs.

SPIEGEL, INC., a Corporation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT

The above-entitled cause came on regularly for  
trial on the 5th day of January, 1950, before the  
Court sitting without a jury, a jury having been  
waived. Shimmel, Hill and Hill, by Mr. Blaine B.

Shimmel, appeared as counsel for the plaintiff, and Jennings, Strouss, Salmon & Trask, by O. M. Trask, appeared as counsel for the defendant. The Court having heard the testimony and having examined the proofs offered by the respective parties, the cause having been argued by counsel and submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact and conclusions of law and renders judgment as follows:

### Findings of Fact

1. The plaintiff is a corporation organized and existing under the laws of the State of Arizona, and is a citizen and resident of Phoenix, Maricopa County, Arizona. The defendant is a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of said state but with a place of business at Phoenix, Maricopa County, Arizona. The matter in controversy is in excess of the value of \$3,000.00, exclusive of interest and costs.

2. On April 30, 1938, J. W. Dorris and Sallie G. Dorris, his wife, entered into a lease in writing with Dorris-Heyman Furniture Company, an Arizona corporation, as lessee. Said lease was for a term ending September 30, 1949, with an option to renew said lease for a period of ten years from and after September 30, 1949, which option has been exercised and the term extended.

3. Said lease contained the following provision:

“The Lessee covenants and agrees that if at any time during the term of this lease, or the extended term, if the option to extend is exercised, the Lessors shall be required to pay property taxes levied by the state, county, city or any subdivision of either of them in any year in excess of the sum of Fifteen Thousand (\$15,000.00) Dollars, upon the entire premises covered by this lease, and the lease to Goldwater Mercantile Company, the Lessee during each of said years that the Lessors are so required to pay taxes in excess of Fifteen Thousand (\$15,000.00) Dollars, will pay in addition to the regular monthly rental then payable under the provisions of this lease or extension thereof, such proportion of the excess of said taxes over Fifteen Thousand (\$15,000.00) Dollars, as the rental payable during the original term of this lease bears to the monthly rental payable during the original term of said Goldwater Mercantile Company lease.”

4. Subsequently and on July 17, 1945, Dorris-Heyman Furniture Company entered into a sublease with the defendant, Spiegel, Inc., a corporation, which sublease contained the following provision:

“Subject to the terms of, and with all the rights, privileges and benefits granted the Dorris-Heyman Furniture Company under a certain lease dated April 30, 1938.”

5. The sublease by Dorris-Heyman Furniture Company to Spiegel, Inc., contained no covenant, stipulation or provision under the terms of which the sublessee promised and agreed to pay any excess



of taxes which might accrue under the provision in the original lease as quoted in Paragraph 3, *supra*.

6. There was no intention on the part of the parties to the sublease that the sublessee, Spiegel, Inc., should assume and agree to pay any such excess of taxes which might accrue under the quoted provision of the original lease.

7. For the calendar year 1948, there was an excess of taxes under the quoted provision of the original lease and the original lessee's portion of said excess of taxes was the sum of \$4,517.51 which was paid by said original lessee.

8. The lessee in the original lease, Dorris-Heyman Furniture Company, has changed its name prior to the filing of this action to the name of Coles Trading Company, a Corporation.

### Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter involved in the controversy.

2. No legal obligation has been proved by the plaintiff by writing or otherwise, requiring the defendant, Spiegel, Inc., a corporation, to pay any excess of taxes which might accrue to the original lessee under the provision of said original lease.

### Judgment

It Is Ordered, Adjudged and Decreed that the plaintiff take nothing by its complaint and that the defendant have judgment thereon, together with its costs and disbursements therein expended.



Done in Open Court this 3rd day of July, 1950.

/s/ DAVE W. LING,  
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and Docketed July 3, 1950.

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In the United States District Court  
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

MINUTE ENTRY OF THURSDAY  
JUNE 1, 1950

On Motion of Blaine B. Shimmel, Esquire, counsel  
for the plaintiff,

It Is Ordered that the plaintiff be allowed until  
June 10, 1950, to file objections to Defendant's  
Proposed Findings of Fact and Conclusions of Law.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Objections to Defendant's Findings and Conclusions

I.

Plaintiff objects to Proposed Finding of Fact Number 6, for the reason that the same is not sustained by any competent evidence and is contrary to the evidence.

II.

Plaintiff objects to Proposed Conclusion of Law Number 2, upon the ground that the same is not sustained by any Finding of Fact, or any competent evidence in the record, and is contrary to the evidence.

III.

Plaintiff objects to the Proposed Findings and Conclusions as a whole, for the reason that the same are fragmentary and incomplete, and do not constitute either findings or conclusions upon the major issues formed by the pleadings and raised by the evidence.

Plaintiff's Proposed Findings of Fact

1. That the sublease attached as Exhibit B to plaintiff's complaint, was drafted by defendant's

attorney, and executed in defendant's office at Chicago, Illinois.

2. That, in the negotiations leading up to the drafting by defendant of said sublease in defendant's office at Chicago, Illinois, defendant had before it a copy of the overlease attached as Exhibit A to plaintiff's complaint; that upon examination of the provisions of said overlease, defendant expressly objected to certain provisions thereof, which its officers and agents insisted be "excepted" in the sublease; that defendant did not object to any other of the provisions of said overlease, or urge any other or further exceptions.

3. That following the execution of the sublease on July 17, 1945, defendant went into possession of the leased premises, continued to occupy the same for a period of approximately four years, during which time it paid the rent and performed all of the other provisions of the sublease by sublessee to be performed, and also did the following acts in performance of express covenants of the overlease, which were not excepted in the sublease:

(a) It paid the excess of fire insurance premium.

(b) It paid boiler insurance premium.

(c) It cooperated with Goldwater and paid one-half of the cost of operating the heating plant.

(d) It removed rubbish from the premises.

(e) It kept the premises in repair, except structural repair.

4. That, in executing the sublease to defendant, plaintiff retained no reversionary interest in the leased premises.

#### Plaintiff's Proposed Conclusions of Law

1. That the overlease and the sublease, attached as Exhibits A and B, respectively, to plaintiff's complaint, comprise, and are to be construed as, one instrument.

2. That said instruments should be construed to give effect to every clause and provision contained in the overlease and sublease.

3. That the overlease and the sublease should be construed most strongly against defendant, whose agent drafted the same.

4. That the overlease and the sublease, construed as one instrument, are ambiguous, in that the sublease contains no express covenant providing that the sublessee shall assume and be bound by any of the covenants of the overlease; while, at the same time, said sublease provides that, anything in said overlease (attached thereto and expressly made a part thereof) to the contrary notwithstanding, certain specific covenants of the overlease were not to be assumed by, or be binding upon, sublessee.

5. That, by incorporating in the sublease certain specific covenants of the overlease to which it objected and by which it refused to be bound, defendant, by implication, assumed, and agreed to be bound

by, the remaining covenants of the overlease to which it did not so object.

6. That, by its conduct in assuming and performing for four years, all of the covenants of the overlease which it did not specifically except in the sublease, defendant placed upon the instruments a construction which is now binding upon it, and which now estops it to deny that it assumed and agreed to be bound by the covenants of the overlease providing for the payment of excess taxes.

7. That the sublease is, in legal effect, an assignment of the leasehold interest of the overlease, and obligates the sublessee to perform all of the covenants of the overlease, excepting only those which it specifically excepted or superseded in the sublease.

SHIMMEL, HILL & HILL,

By /s/ BLAINE B. SHIMMEL,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

In the United States District Court for the  
District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District  
Judge, Presiding.

Minute Entry of Monday, June 26, 1950

The defendant's Proposed Findings of Fact and Conclusions of Law and Judgment and Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law and Plaintiff's Proposed Findings of Fact and Conclusions of Law come on regularly for hearing this date.

Blaine B. Shimmel, Esquire, appears for the plaintiff. Ozell Trask, Esquire, is present for the defendant.

Argument is now had by respective counsel, and

It Is Ordered that the record show that said matters are submitted and taken under advisement.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Coles Trading Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 3, 1950.



Dated this 31st day of July, 1950.

SHIMMEL, HILL & HILL and  
BLAINE B. SHIMMEL,

By /s/ BLAINE B. SHIMMEL,  
Attorneys for Plaintiff.

A copy of the foregoing Notice of Appeal was served on us this 31st day of July, 1950.

JENNINGS, STROUSS,  
SALMON & TRASK and  
O. M. TRASK,

By /s/ O. M. TRASK,  
Attorneys for Defendant.

[Endorsed]: Filed July 31, 1950.

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[Title of District Court and Cause.]

BOND ON APPEAL

State of Arizona,  
County of Maricopa—ss.

Know All Men by These Presents:

That Coles Trading Company, a corporation, duly organized and existing under the laws of the State of Arizona, as principal, and Fidelity and Deposit Company of Maryland, as surety, are firmly held and bound unto the above-named Spiegel, Inc., a corporation, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Spiegel, Inc.,

a corporation, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, on July 3, 1950, a judgment was entered in the above-entitled proceeding that the plaintiff take nothing by its complaint and that the defendant have judgment thereon; and

Whereas, the plaintiff and appellant, Coles Trading Company, a corporation, feeling aggrieved thereby, appeals to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such that, if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, the plaintiff and appellant, Coles Trading Company, a corporation, will pay all costs, which may be awarded against it on said appeal.

In Witness Whereof, the said Coles Trading Company, a corporation, as principal and Fidelity and Deposit Company of Maryland, a corporation, as surety, have caused these presents to be executed by their officers and agents thereunto duly authorized.

Dated this 31st day of July, 1950.

COLES TRADING  
COMPANY,  
A Corporation.

By /s/ J. J. COLLINS,  
Its Secretary, Principal.

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,  
A Corporation,

[Seal] By /s/ O. W. ROGERS,  
Its Attorney in Fact,  
Surety.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1950.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAIN-  
TIFF-APPELLANT INTENDS TO RELY  
ON APPEAL

I.

Finding of Fact No. 6 is contrary to the clear weight of the evidence; moreover, it assumes ambiguity in the overlease and sublease, which assumption is contrary to the findings and conclusions as a whole and the judgment entered thereon.

II.

Conclusion of Law No. 2 is unsupported by any finding of fact or any substantial evidence, and is induced by an erroneous view of the law.

III.

The overlease and sublease should be construed as one instrument, so as to give effect to every material provision therein contained, and most strongly against defendant, which drafted the same; as so construed, the instruments are ambiguous.

## IV.

By incorporating in the sublease certain specific covenants of the overlease to which it objected and by which it refused to be bound, defendant assumed and agreed to be bound by the remaining covenants of the overlease, to which it did not so object.

## V.

By its conduct in assuming and performing for four years all of the covenants of the overlease which it did not specifically except in the sublease, defendant placed upon the instruments a construction which is now binding upon it, and which now estops it to deny that it assumed and agreed to be bound by the covenant of the overlease providing for the payment of excess taxes.

## VI.

The sublease is in legal effect an assignment of the leasehold interest of the overlease, and obligates the sublessee to perform all of the covenants of the overlease, excepting only those which it specifically excepted or superseded in the sublease.

Dated July 31, 1950.

SHIMMEL, HILL & HILL and  
BLAINE B. SHIMMEL,

By /s/ ROULAND W. HILL,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1950.

In the District Court of the United States for the  
District of Arizona

No. Civ. 1306-Phoenix

COLES TRADING COMPANY, a Corporation,  
Plaintiff,

vs.

SPIEGEL, INC., a Corporation,  
Defendant.

### REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly for hearing before Hon. Dave W. Ling, Judge, presiding in the above-entitled court without a jury, commencing at the hour of 10:00 o'clock, a.m., on the 5th day of January, 1950, at Phoenix, Arizona.

The plaintiff was represented by Messrs. Shimmel & Rouland Hill, of Messrs. Shimmel, Hill & Hill, Phoenix, Arizona.

The defendant was represented by Mr. Ozell Trask, of Messrs. Jennings, Strouss, Salmon & Trask, Phoenix, Arizona.

The following proceedings were had:

The Clerk: Civil 1306, Phoenix, Coles Trading Company, a corporation, plaintiff, versus Spiegel, Inc., a corporation, defendant, for trial.

The Court: Are you ready, gentlemen?

Mr. Shimmel: The plaintiff is ready.

Mr. Trask: The defendant is ready.

The Court: Call your first witness.

Mr. Shimmel: The Court is sufficiently familiar with the subject matter?

The Court: Well, I was at one time. There was a motion filed.

Mr. Shimmel: Yes. I assume the Court is familiar with the pleadings. I will call Mr. Coles as a witness. I have four instruments that I request the Clerk to mark for identification.

(Thereupon the documents were marked as Plaintiff's Exhibits 1, 2, 3, and 4 for identification.)

### FRANK E. COLES

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Shimmel:

Q. State your name. A. Frank E. Coles.

Q. Where do you reside? A. Phoenix.

Q. You are President of the Coles Trading [2\*] Company, are you not, and were in '45 and previously? A. Yes.

Q. And is that the same corporation as the Dorris-Heyman Furniture Company, formerly that name? A. Yes.

Q. The change was effected by the change of name in '45, is that not correct? A. Yes.

Q. Are you, as President of this corporation, familiar with the overlease executed in April, '38,



(Testimony of Frank E. Coles.)

from J. W. Dorris and wife to Dorris-Heyman Furniture Company?      A. Yes.

Q. Who is the successor-owner of that property as lessor of that lease at the present time?

A. Well, the Dorris Estate, which is handled by the Valley National Bank as trustee.

Q. And that was the situation in '45, was it not?

A. Yes.

Q. Now, as President of the Dorris-Heyman Furniture Company, in July of 1945, did you have some negotiations with the defendant, Spiegel, Inc.?

A. Yes.

Q. And what was, in general, that transaction; just [3] state briefly what the transaction was?

Mr. Trask: If the Court please, we object to any oral testimony regarding the transaction, upon the ground that the results of the negotiations have been integrated in a written document.

The Court: He probably does not intend to give the details.

Mr. Shimmel: This is just briefly.

The Witness: You mean as to what we sold them?

Mr. Shimmel: Well, there was a sale of your stock of merchandise?

A. We sold them a stock of merchandise and the accounts and the going business and the lease.

Q. That is——

A. Which is all one transaction.

Q. That is the furniture business formerly oper-

(Testimony of Frank E. Coles.)

ated by Dorris-Heyman Furniture Company in Phoenix?      A. Yes.

Q. Where were those negotiations had and the transaction consummated?

A. Chicago, at Spiegel's office in Chicago.

Q. The office of Spiegel was in Chicago, but what was said and done between you and the representatives of the defendant Spiegel respecting the overlease between Dorris and Dorris-Heyman [4] Furniture Company.

Mr. Trask: If the Court please, we want to object to the conversation regarding the transaction upon the ground that they have been integrated in written documents.

The Court: That is the general rule.

Mr. Shimmel: Yes. This is for the purpose, your Honor, of explaining the circumstances in which the overlease was executed, assuming that there was ambiguity in it as is raised by the pleadings, and for the purpose of explaining that ambiguity, it being our contention that there was an element of ambiguity within the instrument construed as a whole.

The Court: All right, go ahead.

Mr. Shimmel: Just state as briefly as you can what was said by you and Spiegel respecting the lease feature of the transaction.

Mr. Trask: If the Court please, may my objection go to this entire line of testimony without repeating the objection, so that I won't—I take it

(Testimony of Frank E. Coles.)

that the Court's ruling would be the same, and my objections would be the same throughout.

The Court: Yes.

The Witness: Well, this is in reference to the exceptions, is that it? [5]

Q. (By Mr. Shimmel): With reference to the lease, what was said by you with respect to the lease? A. Well, Spiegel—

Mr. Trask: May we have the time and place and circumstances, who was present, and a foundation laid, please?

Mr. Shimmel: Yes. Just state who was present, as you recall.

A. Well, Mr. Spiegel, the head—the President of the Company; there was Mr. Gatchard; I don't remember what his title was, he was one of the officials; Mr. Klein, I believe, the attorney was there, and my son Jim, myself, and I believe one of the brokers, one—yes, the broker was there.

Q. And do you remember approximately the date?

A. It seems to me it was August, '45, or July, '45.

Q. When was it with reference to the date borne by the sublease as signed, which is July 17th, 1945, if you recall?

A. It was about that time, July, 1945.

Q. Just state now what was said and done.

A. Well, we discussed—they agreed to accept the

(Testimony of Frank E. Coles.)

lease under the same obligations that we had, as the Dorris-Heyman Furniture Company had.

Mr. Trask: If the Court please, I am going [6] to object to this testimony because it is not relating to a conversation, just stating the conclusion of the witness as to what was done, and move that it be stricken.

The Court: All right.

Q. (By Mr. Shimmel): Just state as nearly as you can recall what was said and done?

A. Well, for example, they objected to the clause there regarding the structural—as Dorris-Heyman Company had agreed to take care of any structural defects, and Spiegel Company objected to that, so they set that forth in the lease.

Q. Was that matter discussed between you and Spiegel?

A. Yes, that was discussed and I said, “Well, all right, we will waive that particular item.”

Q. Was a copy of the overlease before you in those negotiations?      A. Yes.

Q. Had a copy of that overlease been delivered to Spiegel previously?      A. Yes.

Q. And it was present in the negotiations in Chicago?      A. Yes.

Q. Well, just state further what was said and done, [7] as you recall.

A. Oh, there was—then they wanted to protect themselves in case of a default, so we, I will say the corporation—default in the lease rent to the Dorris Estate. They had some kind of a provision put in

(Testimony of Frank E. Coles.)

there that they could step in and pay the rent so that they would not lose their rights under the lease. That was another clause put in. I don't remember them all without referring to the documents. I remember those two items very well.

Q. What was said by you or Spiegel with respect to the other provisions of the lease not excepted?

A. Well, they accepted everything except the exceptions they inserted in this agreement.

Mr. Trask: Again we object, if the Court please, upon the ground that it states a conclusion, this line of conversation, and I move that the testimony be stricken on that ground.

The Court: Well, it is a pretty general statement.

Mr. Shimmel: Well, did Spiegel object to any other provisions of the lease than those specifically excepted in the sublease? A. No. [S]

Q. And were the terms of the overlease thoroughly discussed at that time? A. Yes.

Q. And did you finally, at that time and place in Chicago, come to an agreement with Spiegel?

A. Yes.

Q. And were there certain documents drawn?

A. Yes.

Q. Who drew them?

A. The attorneys for the Spiegel Company.

Q. And were they presented to you there then in the final form? A. Yes.

Q. And referring specifically to the instrument

(Testimony of Frank E. Coles.)

called "Sub-lease," being Exhibit B to plaintiff's complaint in this case, that is the sublease that was executed, dated July 17th, 1945, was that prepared by Spiegel at that time? . A. Yes.

Q. Was it presented to you? A. Yes.

Q. And did you sign it there at that time?

A. Yes.

Mr. Shimmel: I offer in evidence Plaintiff's Exhibit 1, being the original tax receipt for the year '48. [9]

Mr. Trask: No objection.

(Thereupon the document was received and marked as Plaintiff's Exhibit 1 in evidence.)



39811 • 10 28 • DCKCRE -- 3,139.92

PRINTED FIGURES ABOVE SHOW AMOUNT PAID ON THIS BILL

39811 • 10 28 • DCKCRE -- 3,139.92

SUBDIVISION	LOT	BLK.	VALUATION		TOTAL TAX	EXEMPT	PREVIOUSLY PAID	BALANCE TAX
			LAND	IMPROV.				
10-28	4-5-6	20	189000	309400	6279.84			
<p>Phoenix</p> <p>Valley National Bank Tr.</p> <p>for J. W. Dorris Estate</p> <p>TAX RATE \$1.20</p>								
			<p>1st Installment Due Oct. 11, 1948 Del. Nov. 8, 1948</p>		<p>1st Installment . . . 3139.92</p>			
			<p>2nd Installment Due March 7, 1949 Del. April 11, 1949</p>		<p>2nd Installment . . . 3139.92</p>			
			<p>Cost &amp; Penalty . . .</p>		<p>Cost &amp; Penalty . . .</p>			
			<p>Total for collection \$</p>		<p>Total for collection \$ 6279.84</p>			

CITY COLLECTOR 53

RETURN WITH REMITTANCE - THIS WILL BE YOUR RECEIPT WHEN PAID TO COLLECTOR, CITY HALL

CITY OF PHOENIX, ARIZONA

REAL PROPERTY TAXES

FOR YEAR 1948 AS DESCRIBED BELOW

APR-7-49 7152 • 10 28 • ACKCRE -- 3,139.92

PRINTED FIGURES ABOVE SHOW AMOUNT PAID ON THIS BILL

SUBDIVISION	LOT	BLK.	VALUATION		TOTAL TAX	EXEMPT	PREVIOUSLY PAID	BALANCE TAX
			LAND	IMPROV.				
10-28	4-5-6	20	189000	309400	6279.84		3139.92	3139.92
<p>Phoenix</p> <p>Valley National Bank, Tr. for</p> <p>J. W. Dorris Estate.</p> <p>TAX RATE \$1.20</p>								
			<p>1st Installment Due Oct. 11, 1948 Del. Nov. 8, 1948</p>		<p>1st Installment . . . Pd.</p>			
			<p>2nd Installment Due March 7, 1949 Del. April 11, 1949</p>		<p>2nd Installment . . . 3139.92</p>			
			<p>Cost &amp; Penalty . . .</p>		<p>Cost &amp; Penalty . . .</p>			
			<p>Total for collection \$</p>		<p>Total for collection \$</p>			

CITY COLLECTOR 52

RETURN WITH REMITTANCE - THIS WILL BE YOUR RECEIPT WHEN PAID TO COLLECTOR, CITY HALL

CITY OF PHOENIX, ARIZONA

REAL PROPERTY TAXES

FOR YEAR 1948 AS DESCRIBED BELOW

JAMES E. LINDSAY

TAX COLLECTOR

MANICURE COUNTY ARIZONA

VALLEY NATIONAL BANK OF PHOENIX EXECUTOR W/ J. W. DORRIS, DEC.



EXECUTOR W/S J. W. DONRIS, DEC.

PHOENIX LOTS 4, 5 & 6, BLK 20

SD 1

*OS 14*  
*Robert*  
*Q-Hungman*  
*Robert*

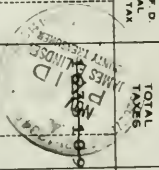
1948

STATE AND COUNTY TAX RECEIPT

NO. 6870

VALUATION	LESS EXEMPTION	NET VALUATION OR ACRESAGE	STATE AND COUNTY TAX	SCHOOL DISTRICT TAX	CITY, VOL. P. D. OR SPECIAL DISTRICT TAX	TOTAL TAXES	FIRST HALF
234888 R		330325	4129061222203			4129061222203	8175.53
PAID BY Valley National Bank						EMMA MAHONEY	8175.53

AMOUNT WILL BE DUE FROM 37TH JAN. DELINQUENCY LAW 280, 1948



MARICOPA COUNTY

JAMES

JAMES W. JORDAN

COUNTY TREASURER AND EX-OFFICIO

TAX COLLECTOR

1948

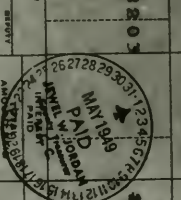
NO. 6870

SECOND INSTALLMENT - STATE AND COUNTY TAX RECEIPT

HEREON, AS INDICATED BY ASSESSMENT ROLLS OF MARICOPA COUNTY

VALUATION	LESS EXEMPTION	NET VALUATION OR ACRESAGE	STATE AND COUNTY TAX	SCHOOL DISTRICT TAX	CITY, VOL. P. D. OR SPECIAL DISTRICT TAX	TOTAL TAXES	SECOND HALF
234888 R		330325	4129061222203			4129061222203	8175.54
PAID BY Valley National Bank						JAMES W. JORDAN	8175.54

JAMES W. JORDAN  
AMMELIA R. JORDAN



Can be paid by check or cash

PAUL P. O'NEILL

SEP 5 1950

FILED

1-678

RECORDS & CLERK  
JAN 5 - 1950  
ADVISOR - 1950

RECEIVED  
SEP 5 1950

55



(Testimony of Frank E. Coles.)

Q. (By Mr. Shimmel): Mr. Coles, I will show you an instrument marked Plaintiff's Exhibit 2 for identification, and ask you if you can identify that statement?

A. Yes, this is a statement we got from the Trust Department of the Valley National Bank billing us for our proportion of the excess taxes.

Q. Was that received by you on or about November, 1948, the date it bears? A. Yes.

Q. Mr. Coles, are you familiar with the allocation of the space in the premises as between Dorris-Heyman Furniture Company and Goldwaters' Mercantile Company; do you know what the percentage of the allocation is?

A. It was approximately 40 per cent for Goldwaters and 60 per cent for Dorris-Heyman Company.

Q. I note this statement refers to 59.2 to Coles Trading Company and 40.8 to Goldwaters', is that the precise allocation?

A. Well, that is probably figured on the number of square feet of the building. I just had it 60 and 40 in my mind. [10]

Mr. Shimmel: Thank you. I offer this in evidence.

Mr. Trask: No objection.

(Thereupon the document was received and marked as Plaintiff's Exhibit 2 in evidence.)

(Testimony of Frank E. Coles.)

## PLAINTIFF'S EXHIBIT No. 2

Valley National Bank  
Trust Department  
Phoenix, Arizona

In account with

Coles Trading Company  
88 North Country Club Drive  
Phoenix, Arizona

Trust No. C-514

11-13-48	Proportionate share of real estate taxes in excess of \$15,000.00, computed as follows:	
	1948 State and County taxes.....	\$16,351.09
	1948 City taxes .....	6,279.84
	Total.....	\$22,630.93
	Less share to be borne by landlord .....	15,000.00
	Balance to be borne by lessees ....	7,630.93
	59.2% of excess over \$15,000 to be paid by Coles Trading Co. ....	\$4,517.51
	(40.8% to be paid by Goldwaters, Inc. \$3,113.42)	

[Endorsed]: Filed September 5, 1950.

Q. (By Mr. Shimmel): Mr. Coles, did the Coles Trading Company thereafter pay to the Valley National Bank, as trustee, the amount of that statement? Showing you Plaintiff's 3 for identification, I will ask you if those are your checks with which you made payment?

A. Yes, these are the cancelled checks.

Mr. Shimmel: I offer them in evidence.

Mr. Trask: No objection.

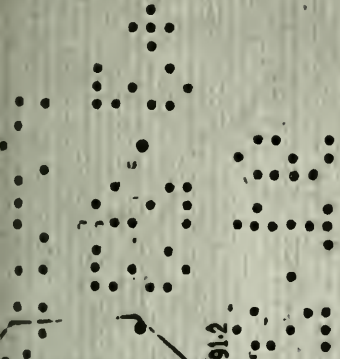
(Thereupon the documents were received and marked as Plaintiff's Exhibit 3 in evidence.)



125

2514

VALLEY NATIONAL BANK  
POST DEPARTMENT



91-2

91-2

VALLEY NATIONAL BANK  
PHOENIX, ARIZONA  
MAR 23 6 41.32 AM

PRIOR ENDORSEMENTS GTD.

HOME OFFICE  
VALLEY NATIONAL BANK  
CENTRAL AND MONROE  
PHOENIX, ARIZONA

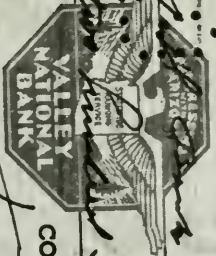
91-2  
1221

91-2  
1221

PRINTED IN ARIZONA

DESCRIPTION	AMOUNT
<i>No. 2 via - Jan 8 1959</i>	
CHANGE	
ORDER AMOUNT	
DISCOUNT	
AMOUNT PAYABLE	

PLAINTIFF'S EXHIBIT NO. 3  
COLES TRADING CO.  
88-N. EQUINE & GOLF DRIVE  
PHOENIX, ARIZONA



COLES TRADING CO.

By *[Signature]*

PAY TO THE ORDER OF  
*Valley National Bank*  
*Twenty two thousand six hundred* DOLLARS  
*Jan 8 1959* \$ *2260.00*

NO. 1331

*3*  
2-19-59

58



55

0514

# THE VALLEY NATIONAL BANK TRUST DEPARTMENT

12673

SUPERIOR COURT COURT OF APPEALS FOR THE NINTH CIRCUIT

**FILED**

SEP 5 1950

**PAUL P. O'BRIEN**

ON THROUGH ACCOUNT

6555067-51

APR

VALLEY NATIONAL BANK  
PHOENIX, ARIZONA

610

*Pltffs* Exhibit No. 3

*Wm H. Jordan* vs *Wm H. Jordan*

Case No. Civ-1306 T.H.

MARKED FOR IDENTIFICATION

JAN 5 - 1950

ADMITTED AND FILED

JAN 5 - 1950

*Wm H. Jordan*

Wm H. Jordan, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BY \_\_\_\_\_ Deputy Clerk

RECORDED OF THIS CHECK BY PAYEE. ACKNOWLEDGED RECEIPT NECESSARY FOR THE FOLLOWING ACCOUNTS

DESCRIPTION	AMOUNT	CHANGE		
		GROSS AMOUNT	DISCOUNT	AMOUNT PAYABLE
Travel Exp	4517.51			
Exp	2228.00			
				2287.51

HOME OFFICE  
VALLEY NATIONAL BANK  
CENTRAL AND MONROE  
PHOENIX, ARIZONA

91-2  
1221

PRINTED IN ARIZONA

COLES TRADING CO.  
88 N. COUNTRY CLUB DRIVE  
PHOENIX, ARIZONA

PAY TO THE ORDER OF Valley National Bank

Twenty Five Hundred and 22/100 DOLLARS

51

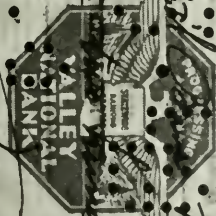
2259.51

4-141944

BY *Wm H. Jordan*

Endorsed: Filed September 5, 1950.

59



COLES TRADING CO.

NO. 1347



(Testimony of Frank E. Coles.)

Q. (By Mr. Shimmel): Showing you Plaintiff's 4 for identification, I will ask you if you can identify that as a letter having been received by the Coles Trading Company?

A. Yes, this is taken from our files.

Q. Received on or about the date it bears, August, 1949?

A. Yes, shortly thereafter.

Mr. Shimmel: I offer it in evidence.

Mr. Trask: No objection. [11]

(Thereupon the document was received as Plaintiff's Exhibit 4 in evidence.)

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PLAINTIFF'S EXHIBIT No. 4

Spiegel  
1061 W. 35th Street

August 3, 1949

Coles Trading Company  
90 North Country Club Drive  
Phoenix, Arizona

Attention: Mr. F. F. Coles

Re: D/B/A Dorris-Heyman Furniture  
Company, Adams and First St.,  
Phoenix, Arizona

Dear Mr. Coles:

We have heretofore paid a portion of the excess of premium on eight point policy over premium on fire policy. We have heretofore paid a portion of the cost of boiler explosion insurance and have here-

(Testimony of Frank E. Coles.)

tofore paid Goldwater Mercantile Company one-half the cost of operating, repairing and maintaining the heating system of subject premises.

These obligations are all your obligations under the lease from J. W. Dorris and Sally G. Dorris to you, dated April 30, 1938. The obligations were not assumed by us under our lease from you dated July 17, 1945, and we hereby serve notice on you that such payments will not hereafter be made by us.

We will, of course, expect you to fulfill your obligations under your lease.

Very truly yours,

SPIEGEL, INC.

/s/ WILLIAM H. KLEIN,  
Assistant Secretary.

WHK/jr

cc: Valley National Bank of Phoenix  
Trustees under the Will of  
J. W. Dorris, deceased, and Sally G.  
Dorris, his wife,  
Phoenix, Arizona

Registered Mail—Return Receipt Requested.

Admitted Jan. 5, 1950.

[Endorsed]: Filed September 5, 1950, U.S.C.A.

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Q. (By Mr. Shimmel): Referring to the period of four years, from July, '45, to the date of this



(Testimony of Frank E. Coles.)

letter, August, '49, Mr. Coles, during that time, who, if you know, paid the excess of premium on the eight-point policy over-premium on fire policy on the premises described in this lease?

A. Well, we didn't pay it.

Q. During that same period who, if you know, paid the boiler insurance premiums?

Mr. Trask: If the Court please, I am going to renew my objection on testimony regarding payments subsequent to the lease as, first, having no probative value; second, on the ground if they can have any probative value it would be an attempt to alter or vary the terms of written documents which the parties heretofore entered into.

The Court: Go ahead.

The Witness: What was that question?

(The question was read by the reporter.)

A. Well, we didn't pay it.

Q. (By Mr. Shimmel): During that same period who paid to Goldwater's Mercantile Company one-half of the cost of operating the heating plant as provided by the overlease? [12]

A. We didn't.

Q. Who, during that period, took care of the removal of rubbish from the store premises?

Mr. Trask: Again, if the Court please, that is—I can say that it has no probative value on the matter in controversy, and I object to it on that ground.

Mr. Shimmel: Your Honor hasn't seen this letter, of course.

(Testimony of Frank E. Coles.)

The Court: No.

Mr. Shimmel: The letter that was offered as an admission by Spiegels four years after the transaction of a specific construction of the lease instrument expressly consistent with our construction. In other words, it is an admission that for four years they did voluntarily without objection, pay the items provided by the over-lease not excepted in the sub-lease. In other words, it was an admission by them and an assumption of the over-lease in four other respects exactly comparable to the tax element here involved, and it is called as an admission against interest, and obviously material as construction by the parties of the terms of the lease if it be considered ambiguous.

Mr. Trask: It, also, if the Court please, the [13] letter also—the purport of the letter was to inform the plaintiff that there was no legal obligation under the terms of the lease to make that payment, and they disclaimed the obligation and notified them they would not make any further payments.

Mr. Shimmel: Yes, there is that element, and we are offering it for the probative value on the construction of the lease for a period of four years.

Mr. Trask: My objection was to the question as to who took the rubbish out of the building, and that has nothing to do with the letter or anything else, as far as I know.

The Court: Well, I don't know.

Mr. Shimmel: Well, it is a specific provision of the over-lease, your Honor, which required the

(Testimony of Frank E. Coles.)

lessee to do that, and I just wanted to show that for a period of four years that is another obligation which had been assumed by the defendant.

The Court: All right, go ahead.

Mr. Shimmel: You may cross-examine.

### Cross-Examination

By Mr. Trask:

Q. Mr. Coles, in connection with the execution of [14] the documents in the sale of your store, the Dorris-Heyman Store, to Spiegel Brothers, and the preparation and the signing of those documents, were you represented by counsel?

A. No, not there.

Q. I beg your pardon?                   A. Not there.

Q. Not at Spiegel's, but before those documents were delivered and the transaction consummated, did you have the advice of counsel; weren't you represented by your attorney, Mr. Shimmel, here?

A. Well, the whole thing was signed up in Chicago, and worked up by them, as I remember it.

Q. May I refresh your memory. Isn't it a fact that Mr. Shimmel acknowledged your signature personally on the sub-lease?

A. Well, that had to be done because we had to get the secretary's signature here, and the sub-lease was brought back here to be signed by the secretary and acknowledged here.

Q. That is right, but isn't it a fact, therefore, that the only signing that was done in Chicago, you signed, and then the documents were brought

(Testimony of Frank E. Coles.)

back here and your acknowledgment was taken by your attorney, Mr. Shimmel, and the Secretary of the corporation signed here, and the documents [15] were later delivered and the transaction completed here in Mr. Gust's office here in Phoenix, do you remember that?

A. I don't remember that, it is four or five years ago; I don't remember it.

Q. Isn't it a fact, Mr. Coles, that before this transacton, before it was completed, you were advised by Mr. Shimmel, who was your attorney, before it was completed and the store turned over?

A. I am very hazy on that. I really can't answer truthfully one way or the other.

Q. Well, Mr.—

A. Well, I could make a statement but I better not.

Q. Mr. Coles, you don't mean to tell the Court, do you, that in a transaction involving something upwards of a half million dollars you had no advice of counsel at all in the matter?

A. May I express what I have in mind on that?

Q. I would like for you to answer the question first, and your counsel can undoubtedly make—

A. I mean I can throw light on the way my mind is working since trying to remember this.

Q. (By Mr. Trask:) Is the original lease present, the sub-lease?

Mr. Shimmel: Well, it is attached to the [16] pleadings; it is admitted, and shows on its face that

(Testimony of Frank E. Coles.)

it was acknowledged in Phoenix, Arizona, by me several days later.

The Witness: There were no changes made by anyone.

Q. (By Mr. Trask): When was it you were in Chicago, Mr. Coles?

A. At the time we signed those documents.

Q. What date was that, approximately?

A. Well, it is the date you have on there. We were there probably a couple of days before.

Q. The sub-lease is dated July 17th. Then, would you say it is July 17th or prior to that time?

A. Somewhere about that time. I can't remember now the correct date.

Q. And you do not deny it, do you, Mr. Coles, that the document was not completed until it was brought back to Phoenix and signed by the other representatives of your organization and acknowledged by Mr. Shimmel?

A. It was signed by our Secretary here.

Q. Mr. Collins? A. Mr. Collins.

Q. And your signature was acknowledged and notarized by Mr. Shimmel here in Phoenix? [17]

A. Well, the document will speak for itself.

Q. And you did consult with Mr. Shimmel during the course of these negotiations and prior to the time the transaction was completed, did you not, Mr. Coles?

A. I think I did, it would sound reasonable that I did. It seems to me I talked to him on the long distance phone about something.



(Testimony of Frank E. Coles.)

Q. But you talked to him after you came back to Phoenix, did you not? A. Yes, I did.

Q. You were, of course, present with Mr. Shimmel, were you, when your signature was acknowledged, were you not? A. Yes.

Q. Mr. Shimmel consulted with you regarding the transaction at that time, did he not?

A. Well, the transaction was consummated then.

Q. Mr. Coles, isn't it a fact that the transaction had not been consummated until the papers were exchanged here in Mr. Gust's office?

A. Well, I don't know that. I am not legally competent to say whether it was or not.

Q. That is correct, I don't want to take advantage of you, Mr. Coles.

A. The papers were all signed in Chicago, and of [18] course, they had to come back and get the Secretary's signature, but it was all completed there and Mr. Shimmel had nothing to do with what happened to be drawn up and signed there, as I remember it. I may have talked to him over the phone about something.

Q. Isn't it a fact, Mr. Coles, that there were considerable additional documents that were necessary to be obtained, and wasn't it necessary, for instance, for your corporation to authorize you by the minutes of the Board of Directors to complete this transaction, isn't that a fact?

A. Well, they had Mr. Shimmel draw that up.

Q. That was done here in Phoenix, was it not?

A. Yes.



(Testimony of Frank E. Coles.)

Q. That was necessary before the transaction was completed, was it not, Mr. Coles?

A. I suppose that authority was granted before the papers were signed. I don't remember.

Q. Mr. Coles, isn't it also true that subsequent to the execution of the sub-lease in connection with any changes or dealings on the property with Spiegel, the corporation consulted with you regarding those changes, alterations, and changes in the property down there at the Dorris-Heyman Furniture Company? [19]

A. I remember one time getting a letter from them, they were going to spend a lot of money there.

Q. And at that time they took the matter up with you?

A. We told them it would involve structural changes and we would want to go into it more farther, and I never heard nothing more from them.

Q. And they took the matter up with you, did they not?

A. Yes, but they never made the alterations.

Q. But the question as to whether or not they could or should was taken up with you on behalf of the Coles Trading Company, was it not, Mr. Coles?

A. Yes, that is, in reference to the structural changes.

Mr. Trask: That is correct. I believe that is all.

Mr. Shimmel: That is all.

(The witness was excused.)

Mr. Shimmel: The plaintiff rests. [20]

### DEFENDANT'S CASE

Mr. Trask: Mr. Klein.

### WILLIAM H. KLEIN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Trask:

Q. Would you state your name, please?

A. William H. Klein.

Q. Where do you live?

A. Chicago, Illinois.

Q. What is your occupation, Mr. Klein, your official position with the Company?

A. I am Assistant Secretary of Spiegel, Inc.

Q. Mr. Klein, you have heard Mr. Coles testify with respect to the completion of the transaction involved in this case?      A. Yes.

Q. Were there any other—Well, let me ask you this: Were you present at the time Mr. Coles was present in Chicago and the papers were prepared in this transaction, the final papers?

A. I thought I was present at all meetings [21] that Mr. Coles was present in Chicago.

Q. In connection with the completion of the transaction, Mr. Klein, were there any other docu-

(Testimony of William H. Klein.)

ments executed other than the lease or sub-lease that was attached to the pleadings in this case?

A. Yes.

Q. What were those, Mr. Klein?

A. Why, they were minutes of the meeting of the sub-lessor corporation; there was the consent—request for and the consent of the underlying lessor, and I believe there was some other document or documents which were required before the instruments were transmitted to us, executed; the exercise of option by the sub-lessor, option to renew the lease.

Mr. Trask: Mark these.

(Thereupon the documents were marked as Defendant's Exhibits A, B, C, D, and E for identification.)

Q. (By Mr. Trask): I will hand you Defendant's Exhibit A for identification, and ask you to state what that document is.

A. This is a letter from the Coles Trading Company, then the Dorris-Heyman Furniture Company, sending a copy of our sub-lease to the Valley [22] National Bank, the underlying lessor.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: I object to it as immaterial.

Mr. Trask: We offer it upon the ground that it shows that it was a request by the Bank, by the Dorris-Heyman Furniture Company to execute and give their consent to the execution of a sub-lease. It is offered for the purpose of showing that the

(Testimony of William H. Klein.)

document which was executed was, in fact, a sub-lease which, I understand, is not the position of counsel.

Mr. Shimmel: It appears that everybody calls it a sub-lease, it is called that in the instrument itself; no doubt about it, we all call it a sub-lease. It just clutters up the record with a lot of instruments.

Mr. Trask: Well, counsel has taken——

The Court: He claims that it was an assignment.

Mr. Trask: That is right, he claims it is an assignment, and it is introduced in evidence in an attempt to impeach——

The Court: All right, all right, it may be admitted.

(Thereupon the document was received and marked as Defendant's Exhibit A in evidence.)

---

## DEFENDANT'S EXHIBIT A

Phoenix, Arizona

July 23, 1945

The Valley National Bank, Phoenix

Trustee Under the Will of J. W. Dorris, Deceased,  
Phoenix, Arizona

In re: Your Trust No. C-514

Gentlemen:

This company is Lessee of the premises at the Southeast Corner of Adams and First Streets, Phoenix, Arizona, under the lease executed April 30, 1938, by your Trustor, J. W. Dorris, and Sallie G.

(Testimony of William H. Klein.)

Dorris, his wife. We enclose a copy of a Sub-lease, which we, as Lessor, executed and delivered to Spiegel, Inc., a Delaware corporation, on July 17, 1945, and hereby request you, as Trustee under the Will of said J. W. Dorris, Deceased, to execute and deliver to us an appropriate instrument, evidencing your consent to this Sub-lease. We understand that you have already satisfied yourselves respecting the qualifications of Spiegel, Inc., as a tenant of the premises.

Yours very truly,

DORRIS-HEYMAN  
FURNITURE COMPANY,

By /s/ F. E. COLES,  
President.

Original of the above letter received this 26th day of July, 1945.

The Valley National Bank of Phoenix, Trustee under the Will of J. W. Dorris, Deceased.

By /s/ VICTOR H. PULIS,  
Trust Officer.

[Endorsed]: Filed September 5, 1950.

---

Q. (By Mr. Trask): I show you Defendant's Exhibit B [23] in evidence and ask you to state what those documents are.

A. Why, they constitute a letter from counsel

(Testimony of William H. Klein.)

in Phoenix addressed to me in Chicago, enclosing a letter from the Valley National Bank to the Dorris-Heyman Furniture Company, to the effect that the Valley National would consent to our sub-lease so long as it was a sub-lease and not an assignment.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: I object to the language of the witness construing the instrument, there being no such language in it.

Mr. Trask: Well, the latter part of it, as far as I am concerned, I would be willing to strike the latter part of it.

Mr. Shimmel: I will object to it as being entirely immaterial.

The Court: All right, it may be received.

(Thereupon the document was received and marked as Defendant's Exhibit B in evidence.)



(Testimony of William H. Klein.)

DEFENDANT'S EXHIBIT B

Gust, Rosenfeld, Divelbess & Robinette  
(Kibbey, Bennett, Gust, Smith & Rosenfeld)  
Professional Building  
Phoenix, Arizona

September 4th, 1945

Our File #5215/L  
Mr. William H. Klein,  
Legal Department—Spiegel, Inc.,  
1061 West 35th Street,  
Chicago (9), Illinois.

Dear Mr. Klein:

In answer to your letter of August 30th, 1945, we enclose herewith copy of the consent of The Valley National Bank of Phoenix, as Trustee under the last Will and Testament of J. W. Dorris, deceased, to the sub-lease to Spiegel, Inc.

The original of this consent was mailed to the Dorris-Heyman Furniture Company here on July 26th. The enclosed copy, however, bears the original signature of Victor H. Pulis, as Trustee Officer of The Valley National Bank. To our knowledge, the application for said consent was considered by the Trust Committee and regularly approved.

Very truly yours,

GUST, ROSENFELD,  
DIVELBESS & ROBINETTE,

By /s/ J. L. GUST.

g/b  
Enc.

(Testimony of William H. Klein.)

Valley National Bank  
Phoenix, Arizona

July 26, 1945

(Copy)

Dorris-Heyman Furniture Company  
Adams and First Street  
Phoenix, Arizona

Attention: Mr. F. E. Coles, President.

Gentlemen:

We are in receipt of your request that we grant permission, in writing, to you to sublet to Spiegel, Inc., a corporation, all of the premises covered by the lease dated the 30th day of April, 1938, by and between J. W. Dorris and Sallie G. Dorris, his wife, and Dorris-Heyman Furniture Company, a corporation, as lessee, of which lease we are now in charge as trustee under the will of J. W. Dorris, deceased.

We are satisfied that Spiegel, Inc., the proposed lessee, is satisfactory as a tenant of said premises and hereby grant you the privilege of subletting said premises to said Spiegel, Inc., a corporation, as sub-tenant.

Your proposed lease with said sub-tenant, however, contains certain provisions which the lease declares shall prevail over anything to the contrary in the over-lease. It is our understanding that those provisions in the sub-lease are agreements between you and your sub-tenant and that the original lessor is not concerned with them in any way, and this

(Testimony of William H. Klein.)

consent is expressly given with the understanding that the provisions of the lease as executed on the 30th day of April, 1938, between J. W. Dorris and Sallie G. Dorris, his wife, and Dorris-Heyman Furniture Company, a corporation, remain binding upon Dorris-Heyman Furniture Company and that we will look to Dorris-Heyman Furniture Company to carry out the provisions of said lease, anything to the contrary in the sub-lease notwithstanding, and that the rights of the sub-tenant as far as we are concerned will be measured by said lease and it must look to you for the fulfillment of any provisions to the contrary in the sub-lease.

The proposed sub-lease contains provisions contemplating subletting to departments of the sub-tenant. We will be glad to consider any requests for such subletting when they are presented under the last sentence of the first paragraph on page four of the original lease.

We trust that you will find the terms of this consent in accordance with your understanding of the effect of the proposed sub-lease.

Yours very truly,

THE VALLEY NATIONAL BANK OF  
PHOENIX, Trustee Under the Will of J. W.  
Dorris, Deceased,

By /s/ VICTOR H. PULIS,  
Trust Officer.

VHP:L

Admitted and filed January 5, 1950.

(Testimony of William H. Klein.)

Mr. Trask: At this time, if the Court please, I have photostatic copies of Defendant's Exhibits A and B in evidence that I would like to substitute for the originals.

Mr. Shimmel: No objection. [24]

Mr. Trask: And may the originals be withdrawn upon substitution of a copy?

The Court: Yes.

Q. (By Mr. Trask): Mr. Klein, I show you Defendant's Exhibit C for identification, and ask you to state what that document is.

A. This is a certified copy of the minutes of the special meeting of the Board of Directors of the Dorris-Heyman Furniture Company, July 10th, 1945, with reference to the sale of the premises—the sale of the property, etcetera.

Mr. Trask: I offer that in evidence.

Mr. Shimmel: No objection.

(The document was received and marked Defendant's Exhibit C in evidence.)

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### DEFENDANT'S EXHIBIT C

Minutes of Special Meeting of Board of Directors of Dorris-Heyman Furniture Company, Held July 10, 1945, at 4:00 p.m., in the Office of the Company, 101 West Adams Street, Phoenix, Arizona

The following Directors were present:

F. E. Coles

John J. Collins

(Testimony of William H. Klein.)

Absent:

Loretto J. Coles

On motion duly made, seconded and carried, the directors present waived notice and consented to the holding of this special meeting.

The meeting was presided over by F. E. Coles, and John J. Collins acted as Secretary. Mr. Coles then announced that they had a proposition from Spiegel, Inc., of Chicago, to purchase most of the physical assets of this company, including its inventory of merchandise at Phoenix and Tucson, its merchandise in transit, its leasehold improvements, fixtures, equipment and motor vehicles (per schedule), accounts receivable, and to sub-lease its Phoenix and Tucson stores, and lease its warehouse on East Madison Street, Phoenix; he also stated that it would be necessary to go to Chicago to consummate this sale and lease arrangements. Therefore, on motion duly made and unanimously carried, Mr. F. E. Coles was authorized by the Directors present to go to Chicago to consummate the transaction mentioned in these minutes, and to execute all necessary instruments to complete the transaction.

There being no further business to come before the meeting, on motion duly made, seconded and carried, the meeting adjourned.

Dated at Phoenix, Arizona, July 10, 1945.

/s/ JOHN J. COLLINS,  
Secretary.

(Testimony of William H. Klein.)

I, John J. Collins, Secretary of Dorris-Heyman Furniture Company, an Arizona corporation, hereby certify that, at a duly called and convened meeting of the Board of Directors of said corporation, held at Phoenix, Arizona, on the 10th day of July, 1945, at which a quorum was present and voting, I recorded the foregoing minutes; and that the foregoing is a full, true and correct copy of said minutes.

Dated at Phoenix, Arizona, this 10th day of July, 1945.

/s/ JOHN J. COLLINS,  
Secretary.

Admitted and filed January 5, 1950.

---

Q. (By Mr. Trask): I show you Defendant's Exhibit D for identification, Mr. Klein, and ask you to state what that document is.

A. This is a photostatic copy of an exercised option by Dorris-Heyman Furniture Company, exercising the option to renew the lease which was delivered to Spiegel, Inc., at the time of the closing of the original transaction.

Mr. Trask: I offer it in evidence.

Mr. Shimmel: The same objection, immaterial.

The Court: It may be received. [25]

(Thereupon the document was marked as Defendant's Exhibit D in evidence.)



(Testimony of William H. Klein.)

DEFENDANT'S EXHIBIT D

State of Arizona,  
County of Maricopa—ss.

The lease for premises at Adams and First Street, Phoenix, Arizona, which Dorris-Heyman Furniture Company holds and under which it is in possession of said property, expires on September 30, 1949.

Under the provisions of said lease, Dorris-Heyman Furniture Company has the privilege of renewing said lease at a rental of Twenty-one Hundred and Fifty Dollars (\$2150.00) per month for an additional term of ten (10) years upon the same terms and conditions as in said lease contained, and Dorris-Heyman Furniture Company, therefore, hereby gives notice that it demands a renewal of the lease dated April 30, 1938, in which J. W. Dorris and Sallie G. Dorris, his wife, of Phoenix, Arizona, are named as Lessors for the store located at Adams and First Street, Phoenix, Arizona, for the term of ten (10) years from and after the 30th day of September, 1949, according to the provisions in the said lease.

DORRIS-HEYMAN  
FURNITURE CO.,

F. E. COLES,  
President.

Attest:

/s/ J. J. COLLINS,  
Secretary.

(Testimony of William H. Klein.)

Notice To:

The Valley National Bank of Phoenix, Trustees under the Will of J. W. Dorris, Deceased, and Sallie G. Dorris, his wife, of Phoenix, Arizona.

Admitted and filed January 5, 1950.

---

Q. (By Mr. Trask:) You heard Mr. Coles testify on direct examination with respect to some specific amendments and modifications of the original agreement and sub-lease. I show you Defendant's Exhibit E for identification, and ask you to state whether or not those are the documents about which Mr. Coles testified?

A. Yes, I believe they are.

Q. Those are photostatic copies of the original documents?

A. Original documents, yes, sir.

Mr. Trask: We offer it.

Mr. Shimmel: The same objection, immaterial.

The Court: It may be received.

(Thereupon, the document was received as Defendant's Exhibit E in evidence.)

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#### DEFENDANT'S EXHIBIT E

Agreement made this 10th day of December, 1945, by and between Coles Trading Company, formerly "Dorris-Heyman Furniture Company," a corporation organized and existing under the laws of Arizona, (hereinafter sometimes called "Dorris"), and Spiegel, Inc., a corporation organized

(Testimony of William H. Klein.)

and existing under the laws of Delaware, (hereinafter sometimes called "Spiegel"):

Witnesseth

Whereas, the parties hereto did on the seventeenth day of July, 1945, enter into an agreement whereby, Dorris demised and sublet to Spiegel the following described premises, situated in the County of Maricopa, State of Arizona, to wit:

The North Half ( $N\frac{1}{2}$ ), and the East twenty-three (23) feet of the South Half ( $S\frac{1}{2}$ ) of the basement, including the area under the West and North sidewalks adjacent to the said North Half ( $N\frac{1}{2}$ ); the North Half ( $N\frac{1}{2}$ ) of the first and second floors; and all of the third and fourth floors; of that certain building at the southeast corner of First and Adams Streets, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half ( $S\frac{1}{2}$ ) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwaters Mercantile Company, Lessee of the balance of said building.

commonly known as the southeast corner of East Adams and First Streets, Phoenix, Arizona, and

Whereas, Dorris is the lessee under a certain lease dated April 30, 1938, of which "Dorris-Heyman Furniture Company" is the lessee and the Valley National Bank of Phoenix, Arizona, as

(Testimony of William H. Klein.)

Trustee under the will of J. W. Dorris deceased, (hereinafter sometimes referred to as "Valley"), is the lessor, and

Whereas, Spiegel has obtained the consent of Valley, to the curing of any default of Dorris by Spiegel, and

Whereas, the parties hereto believe it would be to their mutual advantage to amend said agreement in the following particulars;

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, it is agreed as follows:

In the event Dorris shall be in default under its lease from Valley and in the event Valley shall so notify Spiegel, Dorris agrees that Spiegel may cure such default and in the event Spiegel does cure such default the full amount of the cost and expense entailed shall immediately be owing by Dorris to Spiegel and Spiegel shall have the right to deduct the cost thereof, from any rental due or accrued or to become due or accrue to Dorris from Spiegel.

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names and by the officers hereunto duly authorized, and the corporate seals to be hereunto affixed, the day and year first above written.

[Seal] , COLES TRADING COMPANY,

By /s/ J. E. COLES,

President.

(Testimony of William H. Klein.)

Attest:

/s/ J. J. COLLINS,  
Secretary.  
SPIEGEL, INC.

[Seal] By /s/ M. J. S.

Attest:

/s/ W. A.

This Agreement, made this 10th day of December, 1945, by and between Spiegel, Inc., a corporation of the State of Delaware, (hereinafter sometimes referred to as "Spiegel"), and Valley National Bank of Phoenix, Arizona, as Trustee under the will of J. W. Dorris, deceased, (hereinafter sometimes referred to as "Valley"):

Witnesseth

Whereas, under date of April 30, 1938, J. W. Dorris and Sally G. Dorris entered into a lease with Dorris-Heyman Furniture Company, (hereinafter sometimes referred to as "Dorris"), demising the following described premises situated in the County of Maricopa, State of Arizona, to wit:

The North Half (N $\frac{1}{2}$ ), and the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of the basement, including the area under the West and North sidewalks adjacent to the said North Half (N $\frac{1}{2}$ ); the North Half (N $\frac{1}{2}$ ) of the first and second floors; and all of the third and

(Testimony of William H. Klein.)

fourth floors; of that certain building at the southeast corner of First and Adams Streets, located on Lots Four (4), Five (5) and Six (6), Block Twenty (20), in the City of Phoenix; it being understood that the East twenty-three (23) feet of the South Half (S $\frac{1}{2}$ ) of said basement is subject to the terms of an agreement of even date between Lessee and Goldwaters Mercantile Company, Lessee of the balance of said building,

commonly known as the Southeast corner of East Adams and First Streets, and

Whereas, Spiegel, Inc., is the sublessee of Dorris under said lease, and

Whereas, said lease provided for a monthly rental of One Thousand Eight Hundred Fifty (\$1,850.00) Dollars per month, payable on the fifth day of each and every month during the term, and

Whereas, it would be to the advantage of Valley to have Spiegel cure any default by Dorris, and

Whereas, it would be to the advantage of Spiegel to be able to cure any default by Dorris.

Now, Therefore, in consideration of the mutual covenants and agreements herein contained, it is agreed as follows:

1. In the event Dorris shall at any time be in default, under the above-mentioned lease, Valley shall notify Spiegel thereof and Spiegel



(Testimony of William H. Klein.)

shall be granted ten days after such notice in which to cure said default.

2. In the event Spiegel cures such default in accordance with Paragraph One hereof then, said lease shall continue in full force and effect and shall be treated for all purposes as though no default had occurred.

3. All notices, demands and reports required under the terms of this lease must be given by registered mail, with postage prepaid, addressed to Valley, to Valley National Bank, Phoenix, Arizona, and addressed to Spiegel, to Spiegel, Inc., 1061 West 35th Street, Chicago 9, Illinois, Attention: Secretary, with a carbon copy thereof addressed to such other parties and such other addresses as the parties hereto may from time to time designate.

In Witness Whereof, the parties hereto have caused these presents to be executed, Valley in its capacity as Trustee, and Spiegel in its corporate name and by its officers and thereunto duly authorized, and its corporate seal to be hereunto affixed the day and year first above written.

VALLEY NATIONAL BANK,

[Seal] By /s/ [Indistinguishable.]

Vice President.

(Testimony of William H. Klein.)

Attest:

/s/ A. K. WILDMAN,  
Assistant Cashier.

SPIEGEL, INC.

[Seal] By /s/ M. J. S.

Attest:

/s/ W. A.

Admitted and Filed January 5, 1950.

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Q. (By Mr. Trask): Now, in connection with the amendments of December 10th, which are Defendant's Exhibit E in evidence, in the course of the negotiation of the form of these documents, did you correspond with anyone regarding that fact?

A. Either I or the Company did correspond.

Q. Who did you correspond with regarding the form? [26]

A. Correspondence was had with Mr. Shimmel, I believe.

Q. And in that connection, is the form in which the documents exist now the form in which they were originally drafted? A. No, sir.

Q. As originally drafted, what did you request in the event Dorris-Heyman should default in their obligation?

A. We requested not only the right to cure the default, but also the right to take an assignment of Dorris-Heyman's interests to ourselves.

(Testimony of William H. Klein.)

Q. Was there any objection made by Mr. Shimmel to that? A. He objected strenuously.

Mr. Shimmel: I object to that, your Honor, it is entirely immaterial, a transaction six months afterwards, I don't know what possible bearing it would have on this lease.

Mr. Trask: It is an amendment—it says on its face it is an amendment to the original transaction and a part of it.

The Court: All right.

Mr. Trask: Would you mark that for identification?

(Thereupon, the document was marked as Defendant's [27] Exhibit F for identification.)

Q. (By Mr. Trask): And in connection with the negotiation of the form of that document, I show you Defendant's Exhibit F for identification, and ask you to state what that is.

A. This is a copy of a letter from Mr. Shimmel to John J. Collins, our then store manager of our operation here in Phoenix.

Q. Have you searched for the original of that document? A. I have.

Q. Is that, then, a typewritten copy, to your knowledge the exact copy of the original?

A. Yes.

Mr. Shimmel: Well, we object to it. It is just a fragmentary part of the correspondence, meaning nothing by itself, not binding upon the plaintiff in any way.

(Testimony of William H. Klein.)

The Court: All right, it may be received.

(Thereupon, the document was received as Defendant's Exhibit F in evidence.)

## DEFENDANT'S EXHIBIT F

Copy

Law Office  
Blaine B. Shimmel  
Title & Trust Bldg.  
Phoenix, Ariz.

October 17, 1945

Mr. John J. Collins,  
c/o Spiegel, Inc.  
(Dorris-Heyman Furniture Co.),  
P. O. Box 2380,  
Phoenix, Arizona

Dear Mr. Collins:

Yesterday, I received from you three copies each of two agreements, apparently drafted by Spiegel, Inc., and executed by that corporation. The first instrument comprises an agreement between Spiegel, Inc., and The Valley National Bank, as Trustee, providing, generally, that Spiegel may cure any default of Lessee Coles Trading Company under the original Dorris lease. The second agreement, between Coles Trading Company and Spiegel, provides that, in the event Spiegel cures any such default, it shall be reimbursed in the full amount of its costs and expenses, which amount it shall have the right to deduct from any rental due under its

(Testimony of William H. Klein.)

sublease and, further, that in the event of such default and curing, Coles Trading Company agrees to assign the lease to Spiegel.

I can readily appreciate why Spiegel desires an express statement of its right to cure any default which may be incurred by its Lessor, Coles Trading Company. If The Valley National Bank is willing to execute the first instrument, I see no objection to it on the part of Coles Trading Company. But with reference to the agreement between Coles Trading Company and Spiegel, I see no basis for the former to agree to assign the lease to Spiegel. Such an assignment would have the effect of eliminating the sublease, and this, of course, was never contemplated. I will want to discuss the matter with Mr. F. E. Coles on his return, but do not presently see any objection to Coles Trading Company agreeing to reimburse Spiegel for any amounts expended in curing a default of Coles Trading Company. It seems to me that this right of reimbursement would exist in any event. But if I correctly understand the import of the two instruments, construed together, the provision requiring Coles Trading Company to assign the lease to Spiegel is objectionable. It may be that you have further information as to the purpose of this provision, and what Spiegel has in mind in proposing it. If so, I will be glad to discuss the matter with you.

Since The Valley National Bank is a party to one of these agreements, I am taking the liberty

(Testimony of William H. Klein.)

of forwarding one copy of each agreement to Mr. J. L. Gust. The other two copies of each instrument are herewith returned.

Yours very truly,

/s/ BLAINE B. SHIMMEL.

BBS:AC

Encl.—2

cc—Mr. J. L. Gust,  
Attorney at Law,  
Professional Building,  
Phoenix, Arizona.

cc—Coles Trading Company,  
817 Security Building,  
Phoenix, Arizona.

Admitted and Filed January 5, 1950.

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Q. (By Mr. Trask): Mr. Klein, with respect to the evidence regarding some payments that had heretofore been made during the term of the lease, would you state to the Court how it happened that those payments were made? [28]

A. Those payments were made either through the store or through our accounting division without in any way checking with the Legal Department. Most payments are made that way unless they amount to a substantial amount, or the accounting department would question them.



(Testimony of William H. Klein.)

Q. Was there any payment made of the taxes which are the subject of litigation here by Spiegel?

A. Not to the best of my knowledge.

Q. At the time when payments were made by the local store, did the local store have a copy of the lease, to your knowledge?

A. They did not.

Q. Or the sub-lease, I mean?

A. No, sir.

Mr. Trask: I believe that is all.

### Cross-Examination

By Mr. Shimmel:

Q. Mr. Klein, are you an attorney?

A. I am.

Q. And you were familiar with all of the provisions of this instrument designated "sub-lease" as executed in Chicago? A. Correct.

Q. And you knew that there were a number of provisions [29] in the over-lease which were being performed for four years by Spiegel, Inc., did you not?

A. I knew there were many such provisions, yes.

Q. Beg pardon?

A. I know there were many provisions, yes.

Q. And until your letter of August 3, 1949, you never made any objection to them?

A. To those of which I knew.

Q. You knew that the over-lease provided for

(Testimony of William H. Klein.)

the payment by the lessee of certain insurance premiums, did you not?      A. Yes.

Q. And you knew that Spiegel was making those payments?      A. I did not.

Q. You did not?      A. I did not.

Q. Never came to your attention?

A. No, sir.

Q. Did you ever check the lease to see who was performing the provisions of the over-lease?

A. No, sir.

Q. Never gave it any thought?

A. No, sir.

Q. Anyone, as far as Spiegel is concerned, [30] give it any thought?

A. That, I can't answer.

Q. You knew that they were operating a heating plant in connection with Goldwater's, did you not?

A. I did not. I was not following the performance of the terms of the lease.

Q. Well, you had a local manager in charge?

A. Yes.

Q. And he was in charge of the heating facilities of your store?

A. If I can help just a little bit as attorney. We have some 300 leases I do not follow until a question is raised.

Q. And you personally did not know to any extent Spiegel was performing the lease?

A. That is right.

(Testimony of William H. Klein.)

Q. When you wrote this letter of August 3rd, '49, that is in evidence here, you had made an investigation? A. That is correct.

Q. And you discovered that for four years your Company had been performing substantially all of the terms of the over-lease which were not excepted in the sub-lease?

A. I checked for the points which were costing the Company money and discovered they were being [31] performed by the Company.

Q. Those are the ones?

A. The four items.

Q. You discovered for four years that your Company had been paying the insurance items and for four years had been contributing with Goldwater's to the heating of the building?

A. Yes.

Q. Now, you specifically recall the occasion when Mr. Coles was in Chicago in July, '45?

A. I do.

Q. You had before you at that time, as attorney for Spiegel, a copy of the over-lease, did you not?

A. I did.

Q. And there were some specific items in it to which you objected, were there not?

A. Correct.

Q. And you told Mr. Coles that you would not assume the obligation to make structural repairs to the building, did you not, either you or Mr. Spiegel, in your presence?

(Testimony of William H. Klein.)

A. I said that that was a point which we would want clearly covered in the agreement.

Q. Yes. In other words, you said that that was one of the obligations in the over-lease which [32] Spiegel would not assume?

A. No, sir. I said that that was one of them which we would not take subject to.

Q. And you insisted upon an exception in the sub-lease specifically eliminating it?

A. Correct.

Q. Then you saw the provision for default without any period of grace and insisted on a 15 day grace provision, did you not? A. Correct.

Q. And you said, in drawing your sub-lease, "We are going to put them in specifically?"

A. That is correct.

Q. And you insisted on some changes in the fire clauses, did you not? A. That is correct.

Q. Then you insisted on a provision for your protection in the event any part of the premises were taken by eminent domain?

A. Yes, sir.

Q. And you insisted in writing the sub-lease that those items be excepted? A. Yes.

Q. And you or Mr. Spiegel, in your presence, asked Mr. Coles specifically to alter the over-lease in those respects, did you not? [33]

A. No, sir.

Q. You told him specifically that in the instrument you were preparing you were going to except those provisions, did you not?

(Testimony of William H. Klein.)

A. I said that we would except those from those things that we took subject to.

Mr. Shimmel: That is all.

Redirect Examination

By Mr. Trask:

Q. Mr. Klein, was there any discussion at that time that Spiegel was to pay the existing rent that Dorris-Heyman was paying in addition to the rent that Spiegel proposed to pay in the sub-lease?

A. No, sir.

Mr. Shimmel: I object to that, your Honor, being entirely immaterial. The sub-lease specifically provides for the rent.

The Court: Well, the question has been answered.

Q. (By Mr. Trask): Was there any discussion at that time about the payment of taxes; specific discussion about that at all? A. No, sir.

Q. Now, in connection with the closing of [34] this transaction, was the transaction closed at that time by all parties, Mr. Klein?

A. No, it was not.

Q. Would you tell the Court how the transaction was handled with respect to its closing?

A. Well, I am going back also from memory of five years ago, but to my memory, the purchase agreement was signed by Spiegel and Mr. Coles, but not by Dorris-Heyman. The instruments were then signed by our local counsel in Phoenix. The

(Testimony of William H. Klein.)

sub-lease was drafted thereafter in accordance with the terms of the purchase agreement and sent to our local counsel, and to Mr. Coles. Additional documents were prepared by Mr. Coles and his counsel, and the exchange took place at Mr. Gust's office when all documents were satisfactory to both sides.

Q. That was in Phoenix? A. In Phoenix.

Q. Was that some time after the meeting in Chicago about which Mr. Coles has testified?

A. It was.

Q. Do you know whether or not Mr. Shimmel participated on behalf of Mr. Coles in the transaction prior to the closing in Mr. Gust's office?

Mr. Shimmel: That is admitted and shows on the [35] face of the record that I did participate in it.

Mr. Trask: Fine. Well, with that statement.

Mr. Shimmel: In the record. I will withdraw the question. That is all.

#### Recross-Examination

By Mr. Shimmel:

Q. Mr. Klein, do I understand you now to say that this instrument, the sub-lease, was not drafted in Chicago at the same time the agreement was?

A. I believe it was not. I believe it was drafted a few days after and transmitted a few days after. I am not positive of that, but my files would seem to indicate that.



(Testimony of William H. Klein.)

Q. You drew both of them, did you not?

A. Yes.

Q. Unmistakably your draftsmanship?

A. Yes, sir.

Q. And if Mr. Coles says he signed both of them there at the same time on July 17th, you think he is mistaken?

A. I believe he is. I am not certain of that, although, but there is——

Mr. Shimmel: That is all.

Mr. Trask: No further questions. [36]

(The witness was excused.)

Mr. Trask: The defendant rests, if the Court please.

Mr. Shimmel: May we have a few minutes recess, your Honor?

The Court: Very well.

(Thereupon, a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Shimmel: The plaintiff rests, your Honor.

The Court: All right. How do you want to submit this?

Mr. Shimmel: We would prefer to argue it at this time, your Honor.

The Court: All right, go ahead.

Mr. Trask: It wouldn't make any difference to me to argue it now, but I would like an oppor-

tunity to submit a brief because there is considerable documentary evidence in the record that I would like to correlate and present to the Court in orderly fashion.

The Court: All right.

Mr. Trask: I would prefer to do it that way. I would argue it at this time if——

The Court: You can both submit briefs and after [37] I read your briefs I will set it down for argument. I may not reach it for several months.

Mr. Trask: I would prefer it that way.

Mr. Shimmel: Very well. Since we have submitted a comprehensive brief already, I think, fully outlining all of our arguments upon the motion for summary judgment or judgment on the pleadings, if agreeable, I'd waive an opening brief and let the defendant file its contentions here.

The Court: Very well.

Mr. Shimmel: I think our contentions are all on record.

The Court: I think so, probably. Both sides have covered it very well.

Mr. Trask: I have some additional authorities I'd like to submit particularly in the light of this evidence.

The Court: What do you want, 20 days or 10 days to file a reply?

Mr. Trask: Did I hear the Court say that it probably would not get to it within the next two or three weeks anyway?

The Court: Yes.

Mr. Trask: My trial calendar is rather heavy now and if I can have 30 days within which to [38] submit my brief I would appreciate it.

The Court: All right.

Mr. Trask: And whatever time Mr. Shimmel feels he might need, he is welcome to have.

Mr. Shimmel: Well, 20 days would be sufficient.

The Court: Very well.

(Thereupon, the trial was ended at 11:10 o'clock, a.m., of the same day.) [39]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 39 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,  
Shorthand Reporter.

[Endorsed]: Filed Feb. 6, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Coles Trading Company, a corporation, Plaintiff, vs. Spiegel, Inc., a corporation, Defendant, numbered Civil-1306 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the record on appeal in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiff's Complaint, filed April 18, 1949.
2. Defendant's Answer, filed May 9, 1949.

3. Minute entry of September 26, 1949 (trial setting).
4. Minute entry of October 24, 1949 (hearing on Motion for Judgment on Pleadings).
5. Minute entry of December 22, 1949 (order denying Motion for Judgment on Pleadings).
6. Minute entry of January 5, 1950 (proceedings of trial).
7. Plaintiff's exhibits 1, 2, 3 and 4, filed January 5, 1950.
8. Defendant's exhibits A, B, C, D, E and F, filed January 5, 1950.
9. Reporter's Transcript, filed February 6, 1950.
10. Minute entry of March 13, 1950 (order setting case for oral argument).
11. Minute entry of March 20, 1950 (case argued and submitted).
12. Minute entry of May 24, 1950 (order that defendant have judgment).
13. Defendant's Proposed Findings of Fact, Conclusions of Law, and Judgment, filed May 29, 1950; and signed by trial judge and refiled and docketed July 3, 1950.
14. Minute entry of June 1, 1950 (order extending time to file objections).
15. Plaintiff's Objections to Defendant's Proposed Findings of Fact, and Conclusions of Law,

and Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed June 12, 1950.

16. Minute entry of June 26, 1950 (hearing on Proposed Findings of Fact and Conclusions of Law).

17. Plaintiff's Notice of Appeal, filed July 31, 1950.

18. Plaintiff's Bond on Appeal, filed July 31, 1950.

19. Statement of Points on which Plaintiff-Appellant Intends to Rely on Appeal, filed July 31, 1950.

20. Plaintiff and Appellant's Designation of Contents of Record on Appeal, filed July 31, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 1st day of September, 1950.

[Seal]      /s/ WM. H. LOVELESS,  
Clerk.



[Endorsed]: No. 12673. United States Court of Appeals for the Ninth Circuit. Coles Trading Company, a corporation, Appellant, vs. Spiegel, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed September 5, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12673

COLES TRADING COMPANY, a Corporation,  
Appellant,

vs.

SPIEGEL, INC., a Corporation,  
Appellee.

DESIGNATION OF PARTS OF THE RECORD  
WHICH APPELLANT CONSIDERS  
NECESSARY FOR THE CONSIDERA-  
TION OF THE APPEAL

To the Clerk of the Above Court:

Appellant respectfully designates the following parts of the record on appeal in the above case as necessary for the consideration on appeal, and respectfully requests that the Clerk print the following parts of the record only, to wit:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Reporter's Transcript of the Evidence.
4. Findings of Fact, Conclusions of Law and Judgment, proposed on May 29, 1950, and approved and entered on July 3, 1950.
5. Plaintiff's objections to defendant's proposed findings of fact and conclusions of law; and plaintiff's proposed findings of fact and conclusions of law filed June 12, 1950.

6. Notice of appeal.
7. Bond on appeal.
8. Statement of points on which plaintiff intends to rely on appeal.
9. All exhibits designated Plaintiff's 1 to 4, inclusive, and Defendant's A to F, inclusive.
10. Each and every minute entry and order rendered and entered by the trial court.
11. Appellant's designation of contents of record on appeal.
12. Statement adopting statement of points on which plaintiff and appellant intends to rely on appeal.
13. This designation of parts of the record which appellant considers necessary for the consideration of the appeal.

Dated this 31st day of July, 1950.

SHIMMEL, HILL & HILL and  
BLAINE B. SHIMMEL,

By /s/ ROUALD W. HILL,  
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 11, 1950.

